

U.S. Department of Labor

Office of Administrative Law Judges
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DATE: October 21, 1999

CASE NO: 1998-WPC-00005

In the Matter of

MAHESH THAKUR

Complainant

v.

**STATE OF NEW MEXICO
ENVIRONMENTAL DEPARTMENT
CONSTRUCTION PROGRAMS BUREAU**

Respondent

Appearances:

Roger Michener, Esquire
For the Complainant

Jerry Walz, Esquire
Sarah Reinhardt, Esquire
For the Respondent

Before: Ainsworth H. Brown
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises from a complaint under the employee whistleblower protection provisions of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1367 *et seq.* (1988) (hereinafter also referred to as "the Act" or as commonly known "the Clean Water Act") and the regulations promulgated thereunder, 29 C.F.R. Part 24. These provisions prohibit employers from discharging or otherwise retaliating against employees who have engaged in certain actions in furtherance of the

Act's enforcement.

I. STATEMENT OF THE CASE

The Complainant, Mahesh Thakur, commenced this proceeding by filing a complaint dated February 20, 1998¹, alleging that the Respondent, the State of New Mexico Environmental Department, Construction Programs Bureau (hereinafter also referred to as "the Bureau"), violated the whistleblower provisions of the Clean Water Act. Specifically, the Complainant alleges that because he engaged in protected activity while an employee of the Respondent, he was subjected to discrimination which included: (1) the failure to promote him on four occasions; (2) the assignment of workloads disproportionately heavy compared to those assigned to the Complainant's colleagues in like positions; (3) the requirement that the Complainant work uncompensated overtime; (4) the establishment of a hostile posture against the Complainant but not against other workers; and (5) a highly critical performance review on January 23, 1998.

The U.S. Department of Labor ("the Department") conducted an investigation of the Complainant's allegations and issued its "Final Investigative Report" in a memo dated April 28, 1999. The Department found that the Complainant had engaged in protected activity when he raised violations of the Clean Water Act during his employment with the Respondent. Among the incidents of reprisals that the Complainant alleged, however, the Department only considered the Respondent's failure to select the Complainant for the position of Program Manager in January 1998². The Department concluded that the Complainant's involvement in protected activity did not play a role in the Respondent's decision not to select him for the position. Rather, it was based on his non-protected activity work performance that was deemed unacceptable by the Respondent, including his delay in processing payments and closing projects, and his relationship with several grant recipients which resulted in their request for his removal from their projects. The Department found, therefore, no causal link between the Claimant's protected activity and his nonselection to the Program Manager position and no violation of the Clean Water Act.

Following the conclusion of the Department's investigation, the Complainant requested a formal hearing by his letter dated May 7, 1998. A hearing in this matter was held before me on January 11, 12, 13, and 14, 1999, in Santa Fe, New Mexico.

¹ The Complainant sought to provide "more detailed information" in support of his claim of discrimination in a subsequent letter to the U.S. Department of Labor dated March 5, 1998.

² The Complainant's other allegations of reprisals, including failure to be promoted in 1995 and 1997, failing to have position upgraded, non-paid overtime, and excessive workloads, were deemed by the investigation below to be either "final and unequivocal," and thus barred from consideration as they were not filed within 30 days of the discriminatory act, or not "continuing violations" as defined by the court in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983).

II. ISSUE PRESENTED

The primary issue is whether the Complainant's activity, which consisted of numerous complaints to state and federal officials regarding the Respondent's administration of several federally-funded waste water projects, is protected activity under the whistleblower provisions of the Clean Water Act and, if so, whether the Respondent took adverse employment action against the Complainant in violation of these provisions.

III. APPLICABLE LAW³

Section 507(a) of the Clean Water Act provides as follows:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee ... by reason of the fact that such employee ... has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter. 33 U.S.C. §1367(a).

Section 507(b) of the Act provides that any employee who believes that he has been fired or otherwise discriminated against by any person in violation of the Act may, within 30 days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or discrimination. "A copy of the application shall be sent to such person who shall be the respondent." 33 U.S.C. §§1367(b).

In environmental whistle blower cases, the complainant has the initial evidentiary burden of establishing a *prima facie* case. This is accomplished by showing (1) the complainant was an employee of the party charged with discrimination; (2) the complainant was engaged in protected activity under the Clean Water Act; (3) the employer took an adverse action against him; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. *Passaic Valley Sewerage Com'rs v. Dept. of Labor*, 992 F.2d 474, 480-81 (3rd Cir. 1993).

If the complainant presents a *prima facie* case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th

³ As an initial matter, I would like to address the Respondent's defense that this tribunal lacks jurisdiction over it because the New Mexico Environmental Department is immune from suit in this forum. I decline to rule on the merits of this argument, as this is not the proper forum to raise a Constitutional issue.

Cir. 1989).

Where the respondent does present evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by a preponderance of the evidence, can establish the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet this burden by showing that the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. See *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the testimony of the witnesses at hearing and an analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions and regulations, and relevant case law.

A. Background

Extensive testimony was elicited from both sides at the hearing concerning the Complainant's background, employment history with the Respondent, and the events that eventually lead to the filing of this whistleblower complaint.

Complainant was born in Nepal and was educated in India and England. He attended the University of Bihar and the University of Calpitar in India where he studied engineering. He later earned a master's degree from the University of Cardiff in England. TR at 38-39. After completing his graduate program in 1974, the Complainant moved to the United States to accept a position as an industrial engineer with a mining company in Casa Grande, Arizona. TR at 41. Following a series of comparable engineering jobs, the Complainant accepted a position as an "Environmental Engineer I" with the Respondent, the New Mexico Environmental Department, Construction Programs Bureau, on August 27, 1990. TR at 46.

The Bureau was divided into two sections: federally-funded projects and state-funded projects. TR 47. Initially, the Complainant was responsible solely for overseeing federally-funded waste water treatment projects located throughout the State of New Mexico. TR 47. Following the transfer of engineer Arun Dhwan out of the Bureau in January of 1995, however, the Complainant was informed in a memo from Bureau Chief Pat Oleachea dated January 23, 1995, that he was being assigned all projects, federal and state, that had previously been the responsibility of Mr. Dhwan. TR at 50. The Complainant continued to oversee both federal and state projects until his resignation from the Bureau on July 11, 1997. TR at 136.

In his capacity as an engineer, the Complainant primarily reviewed applications for federal

funding from local communities, which included their preliminary and final plans, and all specifications. After reviewing the funding requests, the Complainant would then determine if the application met the requirements for the award and, if necessary, provide feedback to the requesting community. Once funding was approved, the Complainant would oversee the project to ensure the work was being performed according to federal requirements. This entailed meeting with the recipient community, its consultants and contractors, as well as conducting onsite inspections to evaluate the quality of work and to ensure adherence to maintenance manuals and cost estimates. Finally, the Complainant would process payment requests received from the grantees for the work performed by the contractors and consultants, either approving or disapproving the request based on whether the specifications of the project had been met and the completion of all required intermediate and close-out documents. Exhibit C.

In his letter of complaint dated March 5, 1998, the Complainant alleges that due to his insistence that all projects adhere to federal requirements, he was subjected to numerous acts of discrimination by the Respondent. Exhibit C. As explained above, the Complainant has the initial burden of establishing a *prima facie* case by showing that his alleged protected activity motivated the Respondent to take adverse employment action against him. In the following discussion, I will evaluate the Complainant's *prima facie* case under the analytical framework as set forth in *Passaic Valley*.

B. Prima Facie Case

Employer and Employee

For purposes of the whistleblower provision of the Act, I find that the Complainant is an employee of the Respondent and that the Respondent is an employer as required by the Act.

Protected Activity

Whistleblower provisions are intended to promote a working environment in which employees are free from threats of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act. *Passaic Valley*, 992 F.2d at 478. Such provisions are intended to encourage employees to aid in the enforcement of such statutes through protected procedural channels. *Id.* With this purpose in mind, "protected activity" has been broadly defined as a report or internal complaint of an act which the complainant reasonably believes is a violation of an environmental act. The complainant need not prove that an actual violation occurred. Rather, he must prove only that his complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Ilgenfritz v. United States Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

Internal complaints are specifically recognized as protected activity because the employee is encouraged to first take environmental concerns to the employer to allow the perceived violation to be corrected without governmental intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-

1 (Sec'y Apr. 27, 1987)(Order of Remand). Such complaints also afford the employer an opportunity to justify or clarify its policies where the perceived violations are a matter of employee misunderstanding. *Ilgenfritz*, 1999-WPC-3, at p. 479.

Although broadly defined, protected activity has been limited to the assertion of violations that involve a safety issue or an issue which impacts the environment. In *Odom v. Anchor Lithkemko/International Paper*, for example, the Administrative Review Board held that it is “well established that the whistleblower provisions forbid an employer from retaliating against an employee because he complained about reasonably perceived violations of the Acts’ requirements related to environmental safety. The provisions do not apply to [a claimant’s] occupational, racial, and other nonenvironmental concerns.” 96-WPC-1 at p. 5 (ARB Oct. 10, 1997). *See also Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) (Energy and Reorganization Act protects employees from retaliation based on internal safety and quality control complaints); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB April 8, 1997) (whistleblower provisions protect employees for making safety and health complaints); *Basset v. Niagara Mohawk Power Co.*, 85-ERA-34 (Sec’y Sept. 28, 1993) (protected conduct includes filing internal quality control reports and making internal complaints regarding safety or quality problems); and *Deveraux v. Wyoming Assoc. of Rural Water*, 93-ERA-18 (Sec’y Oct. 1, 1993) (complaints to management about inaccurate records, mismanagement and waste are not related to environment or safety).

The Complainant has presented testimonial and documentary evidence of numerous instances in which he claims to have engaged in protected activity under the Act. This claimed protected activity arose during the course of the Complainant’s oversight of several federally-funded waste water treatment projects. In the following discussion, I will evaluate each instance of the Complainant’s alleged protected activity and determine whether it falls within the statutory definition as set forth above.

1. Pojoaque Pueblo Septage Facility Project

In January of 1995, the Complainant was given responsibility for overseeing the Pojoaque Pueblo Septage Facility Project (the “Pojoaque Project”) after engineer Arun Dhwan’s transfer out of the Construction Programs Bureau. Exhibit C at 12. The Complainant visited the project site on August 15, 1996, and observed what he believed to be “several defects” in the bottoms of the soil-cement lagoons. CX R94-95. After bringing this issue to the attention of the project contractor and project inspector, a meeting was held at which the quality of the soil-cement was discussed. *Id.* Present at the August 23, 1996, meeting was the Complainant, his supervisor Rusty Rodke, and representatives from the Pojoaque Pueblo, project contractor, project consultant, and testing laboratory. TR at 401. The Complainant told the group that repairs to the soil-cement were necessary and expressed his concerns regarding the tests conducted on the soil cement. The results of these tests showed identical compressive strength for each sample taken, a result would not normally be expected as the material is non-homogenous. *Id.*

Thereafter, on August 28, 1996, the Complainant and Mr. Rodke conducted another site inspection of the soil-cement. TR at 403. Upon finding no improvement in its condition, they related their observations to Mr. Olachea. *Id.* A meeting was then scheduled by Mr. Olachea for September 26, 1996, for the purpose of discussing the soil-cement issue. Prior to the meeting, however, Mr. Olachea requested that the Complainant, Mr. Rodke, and Orren Drake, a Management Analyst in the federal section, prepare a memorandum documenting their findings. TR at 416. In their memorandum, which was submitted to Mr. Olachea on September 26, 1996, the authors describe the events which occurred during their site inspection on August 28, 1996. CX R94. They state that “Rodke and Thakur examined the soil-cement surface and found several places where the soil-cement was not adhering to lower layers and flaked off easily.” *Id.* They also saw “a few loose spots” on the surface and “wide desiccation cracks” about 20 feet from the outflow pipe. *Id.* Finally, they observed that in one area, “the soil-cement had little cohesion” and that after using a trowel to dig down five inches, they found no solid material.” *Id.*

Attendees of the September 26, 1996 meeting included Mr. Olachea, Mr. Rodke, Pueblo Governor Jacob Viarreal, two officials from the Environmental Protection Agency, and representatives from the Pojoaque Pueblo, project contractor, project consultant, and testing laboratory. TR at 460. Following the meeting, the group went to the site and personally inspected the soil-cement. TR at 461. As a result of the meeting and subsequent inspection, all key parties to the project, including the EPA, were aware of the problems associated with the integrity of the soil-cement.

The Respondent contends that the Complainant’s report to Mr. Rodke and Mr. Olachea concerning the deficiencies in the soil-cement is not “protected activity” under the Act. It concedes that the Complainant raised his concerns with his supervisors, the contractors, the engineers, the Pojoaque Pueblo, and the EPA, and that all of these parties were fully informed and had met openly to discuss the concerns. The Respondent argues, however, that because the Respondent failed to prove either that there was an actual deviation from the specifications or that the problem remained uncorrected, he had no reasonable belief that a violation of the Act ever occurred.

I disagree with the Respondent’s argument and find that the Complainant’s verbal and written reports to his supervisor, Mr. Olachea, as well as to EPA officials, clearly fall within the broad definition of “protected activity.” A complainant need only make a report of an act that touches on the environment and which he reasonably believes is a violation of an environmental act. Whether the alleged violation is ultimately determined to be an actual violation of an act is irrelevant to the question of protected activity. In the present case, the Complainant personally observed and reported what he believed to be defects in the soil-cement. This opinion was shared by both his immediate supervisor, Mr. Rodke, and Bureau Chief Pat Olachea. The concern over the soil-cement resulted in at least two meetings of all key parties associated with the project, as well as two Dallas-based EPA officials who flew to New Mexico specifically for the purpose of discussing the issue. The nature of the Complainant’s reports to his supervisor regarding the soil-cement undoubtedly impacts the environment and I find was a reasonably perceived violation of the Act.

The Complainant further alleges that he engaged in protected activity with respect to the Pojoaque Pueblo Project when he recommended that several payment requests made by the Pueblo be withheld due to deficiencies in the documents submitted. Specifically, the Complainant testified that on March 18, 1997, at the request of Haywood Martin, he drafted a letter to John Chapman, Director of the Environmental Department for the Pojoaque Pueblo, outlining 10 requirements on the project that needed to be satisfied before the project could be closed out and the payments could be disbursed. TR at 177-78. On April 3, 1997, the Complainant alerted Mr. Martin to the fact that the Pueblo had failed to submit a sludge management plan. CX C at 14. Finally, the Complainant wrote a memo to Mr. Martin dated April 17, 1997, outlining the deficiencies in the closeout documents. *Id.* The Complainant asserts that despite his notifications to Mr. Martin that the closeout documents were incomplete, the payments were nonetheless approved. *Id.*

It is well established that protected activity must involve assertions of violations that concern safety issues or impact the environment; complaints to management about inaccurate records are excluded. *See Odom v. Anchor Lithkemko/International Paper, supra*, and *Deveraux v. Wyoming Assoc. of Rural Water, supra*. The Complainant advised his superiors to withhold payment to the Pueblo due to its failure to submit certain required closeout documents. This recommendation by the Complainant in no way concerns a safety issue or impacts the environment. I find, therefore, that although the Complainant was certainly conscientious in bringing this matter to the attention of Mr. Martin, it is not protected activity under the Act.

2. Albuquerque Nitrogen Removal Project

The Complainant's claimed protected activity with respect to his involvement with the Albuquerque Nitrogen Removal Project similarly involves the propriety of honoring a pay request from the City of Albuquerque. In a memorandum written by the Complainant to Mr. Martin on February 5, 1997, the Complainant stated that following his review of a pay request from the City, he determined that the request did not fully comply with the federal regulations. CX K-115. The Complainant subsequently wrote a letter to the City on February 26, 1997, in which he stated that the City's Plan of Operation had been reviewed and that it was deficient in certain areas. The Complainant then made eight recommendations to the City of items that should be incorporated in its final Plan of Operation. CX R61. The Complainant wrote a second letter to the City on February 27, 1997, following his review of the City's Operation and Maintenance Manual. He again noted deficiencies in the manual and suggested eight items that needed incorporation in order to bring the manual into compliance. CX R-63.

On March 10, 1997, the Complainant drafted a memorandum to Mr. Martin which stated that he had reviewed the City's final payment request, but due to the failure of the City to submit the required close out documents, he felt it would be "inappropriate to release the entire amount of the loan." CX R-65. At hearing, the Complainant testified that shortly thereafter, he discussed the matter with Mr. Martin. TR at 180. The Complainant testified that he told Mr. Martin that a portion of the loan should be held back, but that Mr. Martin disagreed and directed him to authorize payment of the full amount requested by the City, the deficiencies notwithstanding. TR at 180, CX R-69. A

payment of \$9,914,911.00, the entire remaining balance of the loan, was sent to the City on April 17, 1997. CX R-70.

The Complainant testified that he believed payment of the full amount was in violation of the Clean Water Act. TR at 294. Thus, because he notified Mr. Martin of this perceived violation, he argues that he had engaged in protected activity under the Act. I disagree. The Complainant's advice that less than the full amount of the loan should have been disbursed to the City of Albuquerque for its failure to submit all required documentation is not protected activity for the same reason his recommendation that payments be withheld from the Pojoaque Pueblo was not protected activity -- it does not concern a safety issue or in any way impact the environment. Again, the Complainant was prudent to notify his superiors of what he believed to be violations of the Act, but protected activity has been clearly interpreted to exclude administrative matters unrelated to safety or environmental concerns. See *Deveraux, supra*.

3. South Valley Sewer Project

The Complainant claims that the Respondent was in violation of the Clean Water Act when it agreed to allow the City of Albuquerque to use a lump sum rather than a cost plus fixed price contract with their engineer on this project. In the Complainant's opinion, federal regulations prohibited a lump sum method of payment. TR at 283. The Complainant argues that he engaged in protected activity when he informed the City and Mr. Martin in writing that the contract did not comply with federal law. CX G-64, CX G-85.

A detailed discussion of the events surrounding this alleged act of protected activity is not required. I find that the type of contract called for under the Clean Water Act's regulations -- lump sum or cost plus fixed price -- does not in any way touch on safety issues or environmental concerns. The substance of the Complainant's complaint involved an administrative matter and, therefore, is not protected activity under the Act.

Accordingly, I conclude the Complainant has established that he engaged in protected activity only in connection with the soil-cement issue at the Pojoaque Pueblo Septage Facility. None of the Complainant's other claimed protected activities, as discussed above, meet the statutory definition as they do not concern safety issues or impact the environment.

Adverse Employment Action

In his complaint, the Complainant set forth the following acts of alleged discrimination:

1. Failure to be Promoted on Four Occasions

In June of 1995, the Bureau advertised for the position of Water Resource Specialist I (WRES I). A WRES I is one grade higher than the Complainant's position, and is paid a minimum of 12 percent more than the Complainant's salary. The Complainant applied for the position and was

interviewed by Mr. Olachea and David Quintana. Tr at 62. During the interview, Mr. Olachea told the Complainant that the position required a professional engineering (PE) license, which the Complainant did not possess. TR at 63. In February of 1996, Haywood Martin was selected for the position, despite the fact that he did not hold a PE license, or even an engineering degree. *Id.*

In April of 1996, the Complainant alleges that he was again bypassed for a promotion to WRES I when the Respondent hired Angela Cross to fill an opening. Ms. Cross had a degree in environmental engineering, but did not hold a PE license and had no experience overseeing federal projects. TR at 67-68.

Approximately one year later, in March of 1997, the Complainant contends that he was discriminated against when Mr. Martin was promoted from WRES I to Health Program Manager I. CX R-7. The position was not advertised. Rather, Mr. Martin's position was reclassified to the higher position, thereby avoiding competitive recruitment and mandatory interviews. *Id.* The Complainant alleges that this was discrimination in that he was denied the opportunity to compete for a position for which he believed he was the more qualified. *Id.*

In July of 1997, the Complainant left the Construction Programs Bureau and transferred to the Air Quality Bureau. TR at 122. Shortly after his departure, Mr. Olachea retired from his position as Bureau Chief. TR at 121. This appeared from the testimony to be a relief to all concerned. Mr. Martin was then promoted to Bureau Chief, creating a vacancy for a Health Program Manager I. *Id.* The opening was advertised and in November of 1997, the Complainant applied for the position. TR at 122. On November 23rd, the Complainant left for an extended trip to India. *Id.* Just prior to leaving, however, the Complainant personally handed a fax to Mr. Martin, who was making the hiring decision, notifying him of his upcoming trip and informing him that he would be available in the week prior to his departure for an interview. TR at 122, 126. No interview was held and the Complainant departed for India. TR at 126.

While in India, the Complainant had arranged for Bhanu Ram, who had also applied for the position, to check his mail and home phone messages, but not his work phone messages. TR at 126. On two occasions, he phoned Mr. Ram and asked whether he had been interviewed for the position. He had not. TR at 126. The Complainant testified that based on his prior experience with the Bureau, he assumed the hiring process would take as long as six months. TR at 126-27. The Complainant returned to work on January 20, 1998, and later learned in February that Darlene Beingessner had been hired for the position. TR at 129. The Complainant alleges that Mr. Martin's failure to interview him for the vacant position was an act of discrimination in retaliation for his protected activity.

2. Disproportionately Heavy Workloads

The Complainant asserts in his complaint that on numerous occasions, he was unfairly assigned project workloads that were disproportionately large in relation to those assigned to his colleagues. Exhibit C. The first such occasion occurred in January of 1995, following engineer Arun

Dhwan's transfer out of the Bureau. In a memorandum dated January 23, 1995, the Complainant was informed by Mr. Olachea that he would thereafter be responsible for all of Mr. Dhwan's projects. TR at 50. This increased the total number of projects for which the Complainant was responsible from 58 to 98. TR at 51.

In January of 1996, Bhanu Ram, an engineer in the state section of the Bureau, resigned from his position. TR at 65. This left the Complainant as the Bureau's only non-supervisory engineer. TR at 65-66. The Complainant was assigned most of Mr. Ram's projects, which more than doubled his workload. TR at 65-66. In April of 1996, the Bureau hired engineer Angel Cross. According to the Complainant, however, Ms. Cross was only assigned five or six federal projects, while he continued to shoulder the majority of the workload. TR at 68-69. In June of 1996, 58 projects that had been transferred from the Complainant to Mr. Martin only one month earlier were reassigned to the Complainant. TR at 69. On December 10, 1996, the Complainant testified that despite being "swamped" with work, he was assigned 19 additional projects by Mr. Martin. TR at 111. Finally, on April 22, 1997, the responsibility for seven of Ms. Cross' projects was transferred to the Complainant. TR at 119.

3. Uncompensated Overtime

As part of his whistleblower complaint, the Complainant has brought a wage and hour claim. Specifically, the Complainant alleges that he has worked a total of 2090 hours of uncompensated overtime during a two and a half year period and that he is owed \$53,300, plus interest. CX R-2.

On March 2, 1998, the Complainant's union filed a Fair Labor Standards Act ("FLSA") overtime claim with the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 201 *et seq.* *Id.* Following an investigation by the Department of Labor, the Complainant was determined to be an "exempt professional employee" under the FLSA by virtue of his job description as an "Environmental Engineering Specialist I" and because he has a Master's Degree. RX D-1. The Department of Labor notified the parties that because of the Complainant's exempt status, it was administratively closing the file on the matter. *Id.* The Complainant testified that he had received a copy of the Department's determination and that he understood it to mean he was not eligible for overtime pay. TR at 303.

I find that the Complainant is prohibited from attaching this cause of action to his whistleblower complaint. The FLSA provides the sole remedy for an employee who claims that his right to overtime has been violated. *See Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp. 1027, 1029 (N.D. Cal. 1972) ("the statutory remedy is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA."). The Complainant has already filed an FLSA claim for his uncompensated overtime with the Wage and Hour Division of the Department of Labor, which determined he is an exempt professional employee. Thus, he has exhausted his sole remedy for overtime pay within the Department of Labor. Also, there was no evidence of disparate treatment.

4. The Establishment of a Hostile Posture Against the Complainant But Not Against Others

The Complainant testified to numerous examples of hostility and harassment by his supervisors which he allege show a pattern of discrimination in retaliation for his protected activity. On July 2, 1996, the Complainant contends that he was harassed and discriminated against by Mr. Olachea when he was directed to type a trip report on the Mesquite Project, rather than being permitted to submit the report handwritten. CX K-35. Mr. Olachea also told the Complainant that the report would be forwarded to the EPA, despite the Complainant's contention that this was not a requirement. TR at 73. After putting considerable effort into preparing the report, the Complainant testified that it was never read by Mr. Olachea, nor was it ever sent to the EPA. *Id.* He claims that the assignment was just an attempt to harass him. CX K-35.

The Complainant also described an event that occurred on July 24, 1996, which he alleges further illustrates the hostile posture taken against him by Mr. Olachea. Following a difference of opinion between the Complainant and Greg Olsen, senior engineer for the City of Albuquerque, regarding whether the South Valley Sewer Project should be implemented using the city's regulations as opposed to the federal regulations, Mr. Olachea drafted a memorandum to the Complainant in which he directed him to make a comparison between the city and federal regulations to determine which were the more stringent. CX K-62. The Complainant was given the memorandum at 2:30 p.m. with instructions to have the project completed by 8:00 a.m. the following morning. TR at 75. The Complainant testified that this was "legal work for which I was not qualified." *Id.* In order to complete the project by the deadline, the Complainant testified that he worked from roughly 2:30 p.m. until 6:30 a.m. the next morning, handing it to Mr. Olachea at approximately 8:00 a.m. *Id.* Thereafter, he stated that Mr. Olachea did not read the report until several days later. TR at 75. The Complainant claims that the directive to have the contract comparison completed by the stated deadline was designed only to harass him into submission. CX R-12.

Finally, the Complainant testified that Mr. Olachea regularly insulted him and used threatening and abusive language, often laced with obscenities, when addressing him. TR at 79. He threatened to fire the Complainant several times and, on at least on occasion, shouted at him to do his work. TR at 80-82. These incidents, according to the Complainant, further evidenced the hostile environment he endured while employed for the Respondent.

5. A Highly Critical Performance Review

On January 23, 1998, the Complainant met with Mr. Martin to sign his final performance evaluation for the period of August 1996 through July 11, 1997, his last day with the Bureau. TR at 127. The evaluation was prepared on November 12, 1997, by Richard Rose, who supervised the Complainant from April 15, 1997, until his departure. CX K-180. Upon reading he had been given a rating of "needs improvement" in several categories, the Complainant refused to sign the evaluation. TR at 127.

The Complainant then met with Andrew Nowak, a union representative, and commenced a

grievance regarding the performance evaluation. CX R-9. In response, Mr. Rose prepared a detailed memorandum to Mr. Martin justifying his evaluation of the Complainant. RX B-46. He concluded his report by stating, “[a]fter review of the grievance and my evaluation, I still believe my overall ‘needs improvement’ rating is appropriate for the time he was under my supervision. The incidence of insubordination and failure to work with our customers, in and of itself, supports this conclusion.” *Id.* The grievance was ultimately resolved in the Complainant’s favor when the Bureau agreed to change the evaluation so that the Complainant would receive a final summary evaluation of “very good.” RX B-11.

The Complainant has no grounds for alleging discrimination in violation of the Clean Water Act on the basis of his final performance evaluation. After reviewing the evaluation and disagreeing with the job rating he received, the Complainant, as was his right, sought redress through his union grievance procedure. The matter was concluded when the evaluation was upgraded to the Complainant’s satisfaction. As a result, I find the Complainant was “made whole” by the grievance procedure and has suffered no adverse employment-related discrimination on the basis of his poor performance evaluation.

Inference That Protected Activity Was Reason For Adverse Action

To prevail on the fourth element of the *prima facie* case, a complainant needs only to establish a reasonable inference that his or her protected activity lead to, or caused, the respondent’s adverse action. This burden to show an inference of unlawful discrimination is not onerous. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec’y Jul. 16, 1993). One factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec’y Mar. 4, 1996). Close temporal proximity may be legally sufficient to establish the causation element of the *prima facie* case. *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec’y Jan. 5, 1993). On the other hand, if a significant period of time lapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.* 87-ERA-27 (Sec’y Jan. 6, 1992).

The Complainant has established only one instance of protected activity. It commenced on September 26, 1996, when he jointly authored a memorandum to Bureau Chief Pat Olachea detailing the deficiencies of the soil-cement at the Pojoaque Pueblo site. Thus, any acts of alleged discrimination must have occurred on or after this date in order to have been in retaliation for the Complainant’s participation in protected activity. In addition, the Complainant has the burden of presenting direct or circumstantial evidence of a nexus between the protected activity and the adverse employment action in order to raise the inference that the protected activity was the likely reason for the adverse employment action. The following discussion will address each of the four adverse employment actions taken against the Complainant that occurred on or after September 26, 1996.

Of the four discriminatory acts alleged by the Complainant, two involve his failure to be promoted to positions within the Construction Programs Bureau. The first occurred in March of

1997 when Mr. Martin's position was upgraded from WRES I to Health Program Manager I. The opening was not advertised and no competitive recruitment or interviews took place. The Complainant contends that this reclassification was a scheme on the part of the Bureau to bypass him for consideration. The second act of alleged discrimination occurred in late 1997 when Mr. Martin was promoted to Bureau Chief, creating an opening in the Health Program Manager I position. As described above, the Complainant applied for this position in November of 1997 and then left for an extended trip to India. Upon his return in January of 1998, he learned that the position had been filled by an outside applicant, Ms. Beingessner.

The Complainant has not established that his failure to be selected for either of these positions was in any way connected to his protected activity involving the Pojoaque Pueblo soil-cement. With respect to the upgrade of Mr. Martin's position, there was no direct evidence or testimony presented at hearing, other than the Complainant's own testimony of the animus that he perceived to exist between him and Mr. Olachea, to support the Complainant's allegation that the upgrade was done for anything other than legitimate, nondiscriminatory reasons. The Complainant merely concludes that because he was not interviewed for and offered the position that it must have been due to his protected activity. The Complainant's intuition alone is insufficient to establish the required nexus between his protected activity and his failure to be considered for the position. Furthermore, I do not find the proximate timing of the protected activity and the Complainant's failure to be promoted to Health Program Manager sufficient to raise the inference of causation.

Likewise, I am not persuaded that the evidence establishes a causal connection between the Complainant's protected activity and his failure to be offered the Health Program Manager position following his application for the job in November of 1997. The Complainant testified that although he notified Mr. Martin that he would be available for an interview in the week prior to his departure for India, no interview was scheduled. He argues that this was an intentional and discriminatory act designed to exclude him from consideration for the position.

According to testimony by Mr. Martin, before any applicants for a position can be interviewed, a list of eligible candidates must be published by the State Personnel Office. TR at 638. The list for the Health Program Manager position, which included the Complainant, was not published until December 22, 1997. *Id.* As a result, Mr. Martin was prohibited by agency regulation from interviewing the Complainant for the position prior to his departure for India. Clearly, Mr. Martin's failure to honor the Complainant's request to be interviewed before December 22nd cannot be construed as discrimination. The Complainant further argues that because he was placed on the "Band A" list of candidates, his failure to be interviewed was discrimination because agency regulations state that interviewing of such candidates is mandatory. While this may be true, Mr. Martin could not have been expected to interview a candidate who was not available at the time interviews were conducted. Mr. Martin testified that he called the Complainant's work number to schedule an interview. TR at 638. Although he knew the Complainant was not in the office, he felt that he had an obligation to attempt to contact him. He also thought there was a possibility that the Complainant was returning early from his trip or that there might be a message concerning his return on his voice mail. TR at 639. Mr. Martin called the eligible candidates during the week of December

23rd, and interviews were held on January 6-8, 1998. He denied scheduling the interviews for a time when he knew the Complainant was not available. TR at 640. Rather, he testified that his motivation for filling the position as quickly as possible was that he was short-staffed. TR at 641. Also, because the list of eligible candidates is not published for six to eight weeks after the candidates have applied for the position, Mr. Martin testified that he sought to contact the candidates as soon as possible in order to reach them before they had accepted other employment. *Id.*

I find Mr. Martin's testimony regarding this hiring process to be credible. He was prohibited by agency procedure from interviewing the Complainant prior to his trip to India, and offered a plausible, nondiscriminatory explanation for the timing and method of his hiring procedure. It was unfortunate for the Complainant that his trip to India coincided with the hiring period. Undoubtedly, his unavailability for an interview was a significant factor that led to his failure to be selected for the position, but there is no evidence in the record that would indicate the Complainant was not fairly considered. In fact, he was presumably one of the top candidates as evidenced by his placement on the "Band A" list by the State Personnel Office. Nevertheless, the Complainant has established neither that he was discriminated against in the hiring process, nor that his failure to be offered the position was related to his protected activity.

The Complainant's third claim of discrimination involves what he perceived as a hostile posture taken against him while employed at the Bureau, allegedly in retaliation for his protected activity. Two examples of this hostility were the events surrounding his Mesquite Project trip report and the South Valley Sewer Project contract comparison ordered by Mr. Olachea. Both of these incidents, however, occurred prior to September 26, 1996, and therefore could not have been in retaliation for his protected activities. The remaining evidence of the alleged hostility consists generally of the malevolent treatment of the Complainant by Mr. Olachea.

It was well-established by the evidence and testimony at hearing that Mr. Olachea was an abrasive and demanding supervisor who often lacked tact when dealing with his subordinates. Mr. Martin testified that he was a "stern task master" who had an "aggressive style of management." TR at 599, 605. Mr. Rodke recalled a verbal reprimand from Mr. Olachea in which he used abusive and obscene words, and stated that he "frequently used profanity" while "attacking" someone, but that this was "regular treatment" of the staff. TR at 408. While at lunch with Edgar Thorton, Deputy Secretary of the New Mexico Environmental Department, the Complainant discussed Mr. Olachea's threatening and abusive treatment of him. Mr. Thorton responded by stating that this was simply "Pat's management style." CX K-63. The Complainant also testified that on numerous occasions, Mr. Olachea shouted at him to do his work and threatened him with termination.

In order to create an inference that Mr. Olachea's treatment of him was discriminatory, the Complainant must at a minimum show that he was treated differently than Mr. Olachea's other subordinates, and that this disparate treatment was in retaliation for his protected activities. He has failed to do so. It is clear from the numerous witnesses at hearing that Mr. Olachea had a well-deserved reputation for hostile treatment of his employees. Thus, there is no merit to the Complainant's argument that a hostile posture was established against him but not others, as it is clear

that Mr. Olachea did not single out the Complainant as a target for his abuse. On the contrary, it appears that no employee was insulated from Mr. Olachea's abusive diatribes. Furthermore, the Complainant has not presented any direct or circumstantial evidence specifically linking Mr. Olachea's treatment of him to his protected activity. Therefore, I find no ground for the Complainant's claim of discrimination on the basis of Mr. Olachea's conduct while supervising the Complainant.

The Complainant's final allegation of discrimination relates to a workload which he claims was disproportionately large compared to other engineers in his unit. Although he identified five instances in which he was assigned additional projects, only two occurred after September 26, 1996. On December 10, 1996, he was assigned 19 additional projects by Mr. Martin, and on April 22, 1997, seven of Ms. Cross' projects were transferred to him. TR at 111, 119.

When questioned at hearing, Mr. Martin acknowledged that the Complainant had a heavy caseload, but stated that *every* project manager had a heavy caseload. TR at 597. He generally cited understaffing in the Bureau due to budgetary issues and Mr. Olachea's "lean and mean" operating philosophy as the cause. TR at 602. Leroy Smith, a colleague of the Complainant who worked in the Bureau for two years, testified that "we were all quite involved and buried in work in that department." TR at 526. In Mr. Martin's opinion, the Complainant was at least partially responsible for his heavy caseload. Following a reallocation of projects, the Complainant voluntarily chose to keep many of the projects for which he had been responsible rather than give them up. Mr. Martin described the Complainant as "possessive about his projects." TR at 598. Moreover, Mr. Martin could not recall a single time in which the Complainant approached him to discuss being overburdened with work. *Id.*

My review of the evidence and testimony reveals nothing relating to the Complainant's caseload to indicate that it was inequitable or more burdensome than that of his colleagues. Rather, it appears from the testimony that understaffing and turnover within the Bureau were the primary factors that lead to heavy workload for all of the engineers, not merely the Complainant. I further find that no evidence has been presented that would give rise to an inference that the Complainant was given a disproportionately heavy caseload in retaliation for his protected activity.

Based on my analysis of the evidence, I find the Complainant has not prevailed on the fourth element of the *prima facie* case. Of the discriminatory acts alleged by the Complainant that occurred subsequent to his protected activity, none were linked by the evidence to his protected activity in order to create the inference that the protected activity was the likely reason for the adverse employment action. Furthermore, the inference was not established even when considering the temporal proximity of the protected activity to the adverse employment actions.

V. CONCLUSION

In evaluating the entire record, I conclude that the Complainant has not met his initial burden of establishing a *prima facie* case under the *Passaic Valley* framework. Consequently, he has failed

to demonstrate that the Respondent has violated the whistleblower provisions of the Clean Water Act. Although I find that the Complainant engaged in protected activity when he reported the defective soil-cement at the Pojoaque Pueblo, there is no evidence to support his claim that he suffered any adverse employment actions or was otherwise discriminated against in retaliation for this report.

RECOMMEND ORDER

IT IS RECOMMENDED that the Complainant's February 20, 1998 complaint alleging that the Respondent violated the whistleblower provisions of the Clean Water Act be **DISMISSED**.

Ainsworth H. Brown
Administrative Law Judge

NOTICE OF REVIEW: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).